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No. 401

In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CELANESE CORPORATION OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MORTON J. COHEN,
Assistant General Counsel,
LEE E. HORNECK,
Attorney,
National Labor Relations Board,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
A. The Board representation proceeding, and the subsequent unfair labor practice order	2
B. The first decision of the court of appeals which was set aside by this Court	7
C. The second decision of the court of appeals	8
Reasons for granting the writ	9
Conclusion	18
Appendix A	19
Appendix B	22

CITATIONS

Cases:

Cone Brothers Contracting Co. v. *National Labor Relations Board*, 235 F. 2d 37, certiorari denied, 352 U.S. 916	11
Cross Company v. *National Labor Relations Board*, 288 F. 2d 188	17
Foreman & Clark, Inc. v. *National Labor Relations Board*, 215 F. 2d 396, certiorari denied, 348 U.S. 887	11
Gummed Products Co., 112 NLRB 1092	16
International Telephone and Telegraph Corp. v. *National Labor Relations Board*, (C.A. 9), August 28, 1961	14
Merck & Co., 104 NLRB 891	16

Cases—Continued

	Page
National Labor Relations Board v. *Capitol Greyhound Lines*, 140 F. 2d 754, certiorari denied, 322 U.S. 763	11
National Labor Relations Board v. *Donnelly Garment Co.*, 330 U.S. 219	15
National Labor Relations Board v. *S. H. Kress & Co.*, 194 F. 2d 444	11
National Labor Relations Board v. *Marcus Trucking Co.*, 286 F. 2d 583	13
National Labor Relations Board v. *Mattison Machine Works*, 274 F. 2d 347, 365 U.S. 123	2, 8, 9, 10, 11, 17
National Labor Relations Board v. *Moyer & Pratt*, 208 F. 2d 624	11
National Labor Relations Board v. *National Container Corp.*, 211 F. 2d 525	11
National Labor Relations Board v. *National Plastic Products Co.*, 175 F. 2d 755	11, 14
National Labor Relations Board v. *National Truck Rental Co.*, 239 F. 2d 422, certiorari denied, 352 U.S. 1016	11
National Labor Relations Board v. *Shirlington Supermarket*, 224 F. 2d 649, certiorari denied, 350 U.S. 914	11
National Labor Relations Board v. *A. J. Tower Co.*, 329 U.S. 324	10
National Labor Relations Board v. *Waterman Steamship Co.*, 309 U.S. 206	10
Olson Rug Co. v. *National Labor Relations Board*, 260 F. 2d 255	11
Semi-Steel Casting Co. v. *National Labor Relations Board*, 160 F. 2d 388, certiorari denied, 332 U.S. 758	11
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	13, 14
Wilson Athletic Goods Mfg Co. v. *National Labor Relations Board*, 164 F. 2d 637	11

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

	Page
Section 8(a)(5)	7, 19
Section 9(a)	19
Section 9(c)(1)	19, 20
Section 10(e)	20, 21

Miscellaneous:

Jaffe, Judicial Review: "Substantial Evidence on the Whole Record", 64 Harv. L. Rev. 1233, 1260 (1951) 14

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on June 14, 1961, following a remand from this Court.

OPINIONS BELOW

The original opinion of the court of appeals (App. B, *infra,* pp. 28–33) is reported at 279 F. 2d 204. The decision of this Court, vacating that judgment and remanding the case to the court of appeals, is reported at 365 U.S. 297. The opinion of the court below on remand (App. B, *infra,* pp. 22–26) is reported at 291 F. 2d 224. The findings of fact, conclusions of law, and order of the Board (J.A. 85–97, 103–105) [1] are reported at 125 NLRB 352. The

[1] "J.A." refers to the portion of the record printed as the Joint Appendix in the court below.

Board's decision in the representation proceeding (J.A. 64–72), which forms part of the record here, is reported at 121 NLRB 303.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1961 (App. B, *infra,* p. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, on remand to consider the case in the light of *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123, the court below again misconceived the proper scope of judicial review in reversing the Board's determination that a representation election was held by the Board under circumstances which gave the employees power to make a free choice of representatives.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A, *infra,* pp. 19–21).

STATEMENT

A. THE BOARD REPRESENTATION PROCEEDING, AND THE SUBSEQUENT UNFAIR LABOR PRACTICE ORDER

On March 5, 1958, after the Textile Workers Union of America, AFL–CIO, herein called the Union, filed a representation petition with the Board, the respondent Company and the Union entered into an election

agreement. This agreement, approved by the Board's Regional Director, provided for an election to be held on March 12, in the Company's Gallipolis Ferry, West Virginia plant, to determine whether the production and maintenance employees wanted the Union to be their bargaining representative (J.A. 22, 64).

During the period from February 14 to March 8, the Company sent a series of 11 letters (J.A. 35–58) to each of the employees in the unit (J.A. 107–108). Eight of these letters were devoted to a discussion of the various "benefits" currently being received by employees. Many subjects were covered, ranging from wages (J.A. 49, 50, 56, 58), vacations, and paid holidays (J.A. 49–50), to the new lunchroom that was being built and the Company's contributions to an employee social club (J.A. 43–44). In its final letter, the company summarized the various benefits discussed in earlier letters, and restated its attitude toward them as follows (J.A. 56):

> These changes were made because of our progress as individuals working for our company and not because a labor organization demanded that they be done.

The Union replied to the Company's series of letters with two letters of its own on February 24 and March 10 (J.A. 59–63). The second letter was handed to twenty employees on March 10, and mailed to the other employees that evening and received the next day (J.A. 115). This letter began as follows (J.A. 61):

> DEAR FRIEND: The repetitious letters sent to you by the Plant Manager seem to betray an

> inner sense of guilt. In his letters, Mr. Pearson seems to be taking credit for almost everything but the Declaration of Independence.
>
> He says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes, as well as other plant conditions, were won through collective bargaining and in many instances over the initial opposition of the Company.

The March 12 election was won by the Union, 25 to 22 (J.A. 6). The Company filed objections to the election, contending that the March 10 letter contained a "material misrepresentation made by the Union affecting the choice by employees," and that the employer had had no time to reply (J.A. 4). The Company asserted that the misrepresentation consisted of the Union's statement that "Celanese fringes, as well as other plant conditions, were won through collective bargaining * * *" (J.A. 8). Construing the Union's claim to have been that *all* the fringe benefits mentioned in the Company's letters were won through collective bargaining, the Company offered proof that a number of the matters discussed in its letters had never been contained in a collective bargaining contract at any of its plants (J.A. 9). The Regional Director, after investigation of the Company's objections, issued a report recommending that they be overruled (J.A. 11), whereupon respondent filed exceptions with the Board (J.A. 19–34).

The Board, upon review of the record, agreed with the Regional Director that the Union's letter did not

warrant setting the election aside (J.A. 64–71). The Board pointed out that, since it was undisputed that *some* of the benefits mentioned in the Company's letters were obtained through collective bargaining at the Company's other plants, the contention that the Union misrepresented the facts rested on the assumption that it was "claiming to have obtained, through collective bargaining with the [Company], *all* of the benefits, or at least all of the 'fringe benefits,' referred to in the [Company's] pre-election letters" (J.A. 67). The Board found that the Union's letter, on its face, showed that it was claiming only that some unspecified benefits referred to by the Company were obtained by collective bargaining. Moreover, when the Union's letter was read in the context of the Company's letters, the limited character of its claim was even clearer, for some of the benefits referred to by the Company "were of such a nature that the employees could not reasonably have believed that the [Union] was claiming credit for them" (J.A. 68). Accordingly, the Board concluded that the Union's letter did not in fact contain a misrepresentation.

Alternatively, the Board held that, even if the Company's reading of the Union letter were correct and the Union had misrepresented the facts, still the election should not be set aside (J.A. 68–71). The Board pointed out that it will not ordinarily police "campaign representations for their truth or falsehood but will allow the good sense of the employee to determine which are true and which are false" (J.A.

68–69). For employees voting in "hotly contested representations elections," like the voters in political elections, know that the parties "frequently make allegations during the campaign which would not be made by a disinterested historian" (J.A. 69). The Board has departed from this policy only when it was satisfied that the conditions necessary to full freedom of choice did not exist because the employees would be unable to evaluate the inaccuracy and it would be likely to affect their vote—e.g., where a material misrepresentation of fact was made so soon before the election that the other party could not reply, *and* the employees would give particular weight to the misrepresentation because it was made by one having special knowledge of the true facts. In the Board's view, the facts here did not fall within this exception. The Company's position was clearly set forth in its prior letters. And the employees knew that the Company, as a party to the prior contract negotiations, was as well informed as the Union on the question of what benefits ensued from bargaining. Thus, they would not be likely to attribute special weight to the Union's version.

Accordingly, the Board, on August 6, 1958, certified the Union as the collective bargaining representative of the employees in the unit (J.A. 71–72). Thereafter, the Company advised the Union that, until the Board's overruling of its objections to the election was "affirmed by the courts, we must defer recognizing your Union * * *" (J.A. 131–132). The Union filed unfair labor practice charges, and, in the ensuing proceeding, the Board affirmed its decision

in the representation case that the Union's letter of March 10 provided no basis for setting the election aside.[2] The Board therefore held that the Company's refusal to bargain with the duly certified Union violated Section 8(a) (5) and (1) of the Act, and ordered the Company to cease and desist from its unfair labor practice and to bargain, upon request, with the Union (J.A. 103–105, 85–87).

B. THE FIRST DECISION OF THE COURT OF APPEALS, WHICH WAS SET ASIDE BY THIS COURT

On June 16, 1960, the court of appeals declined to enforce the Board's order, concluding that the election was vitiated by the Union's misrepresentation in its March 10 letter (App. B, *infra*, pp. 28–33). In the court's view, the Union's letter claimed that *all* of the fringe benefits enjoyed by the employees were the result of collective bargaining, when in fact some were not, and thus contained a misrepresentation of fact. Noting that the Company had insufficient time before the election in which to reply to the Union's letter, the court concluded that "it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots. The election must, therefore, be held invalid" (App. B, *infra*, p. 33).

The Board petitioned this Court for a writ of certiorari. On February 20, 1961, this Court granted

[2] The Board adopted the findings of the Trial Examiner who, after fully reexamining the Company's contentions respecting the Union's letter, arrived at the same conclusion as had the Board in the prior representation proceeding (J.A. 85–97).

the Board's petition, vacated the judgment and remanded the case to the court below "for consideration in the light of *Labor Board* v. *Mattison Machine Works*" (365 U.S. 297).[3]

C. THE SECOND DECISION OF THE COURT OF APPEALS

On remand, the court below adhered to its original decision and declined to enforce the Board's order (App. B, *infra*, pp. 22–26). In the court's view, the sole question before it on the remand was "the scope of judicial review of orders of the Board respecting the validity of representation elections" (App. B, *infra*, p. 22). The court stated that its function on such review was no different from its function in reviewing unfair labor practice findings, i.e., to determine whether substantial evidence on the record as a whole supports the Board's decision. The court saw no conflict between the substantial evidence rule and the principle that the Board has wide discretion in determining the fairness of elections (App. B, *infra*, pp. 23–24):

> The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole sup-

[3] In *Mattison*, 365 U.S. 123, discussed *infra*, the Court held that the court below had committed "plain error" in setting aside a Board election because of a slight discrepancy in the employer's name, which appeared on the election notices and the ballots.

ports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.

Turning to the facts of this case, the court noted that the Board's policy is to set aside elections where a material misrepresentation has been made so soon before the election that the other side could not reply, and where the employees in all probability gave particular weight to the misrepresentation because the party making it had special knowledge of the true facts. The court held that the Board's finding that these elements were not present here, and that the election was valid, "were not supported by substantial evidence on the record as a whole" (App. B, *infra*, p. 25).

REASONS FOR GRANTING THE WRIT

1. We sought certiorari from the original decision in this case, as well as in *National Labor Relations Board* v. *Mattison Machine Works*, 274 F. 2d 347 (C.A. 7), because the cases revealed that the Seventh Circuit had an erroneous view of the function of a reviewing court in Board representation cases.[4] This Court granted the petition in *Mattison*, and, after hearing argument, issued a *per curiam* opinion in which it held that the Seventh Circuit had committed "plain error" by setting aside the Board election therein (365 U.S. 123). The Court then granted the petition in this case, vacated the judgment below, and remanded the case "for consideration in the light of" *Mattison* (365 U.S. 297). On remand, the court below

[4] See the Board's petitions for certiorari in Nos. 74 and 382, October Term, 1960.

adhered to its original decision. The second opinion makes it entirely clear that the court below still misconceives the standard of review applicable to Board representation determinations. Accordingly, the considerations which prompted this Court to grant certiorari in *Mattison* apply with equal force, if not more strongly, with respect to the Seventh Circuit's second decision in this case.

2. The heart of the Seventh Circuit's error is its failure to recognize the nature of the ultimate question in representation proceedings and also the breadth of the discretion which Congress has confided to the Board. The ultimate question is whether an election is a dependable expression of the employees' free choice of a bargaining representative. This question is one which Congress has delegated to the Board. In the words of this Court, Congress "has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U.S. 206, 226. Accordingly, the courts of appeals have repeatedly recognized that the function of a reviewing court with respect to such matters is confined to guarding against arbitrary or capricious

action by the Board, i.e., the Board's action is not to be disturbed unless it is unreasonable.[8]

The decision below shows that the Seventh Circuit's recent tendency to depart from this principle was not corrected by this Court's recent reaffirmation of that principle in *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123.

The court below never addressed itself to the only proper question—whether the Board acted arbitrarily or capriciously in finding that the election was a dependable expression of the employees' free choice. Instead the court ruled that the election *must* be set aside if (1) there had been a material misrepresentation of fact; (2) coming from a party in an authoritative position to know the true facts; (3) at a time when the other party would have no opportunity to

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[8] *National Labor Relations Board* v. *Moyer & Pratt*, 208 F. 2d 624 (C.A. 2); *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525 (C.A. 2); *National Labor Relations Board* v. *Shirlington Supermarket*, 224 F. 2d 649 (C.A. 4), certiorari denied, 350 U.S. 914; *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755 (C.A. 4); *Cone Brothers Contracting Co.* v. *National Labor Relations Board*, 235 F. 2d 37 (C.A. 5), certiorari denied, 352 U.S. 916; *National Labor Relations Board* v. *Capitol Greyhound Lines*, 140 F. 2d 754 (C.A. 6), certiorari denied, 322 U.S. 763; *National Labor Relations Board* v. *S. H. Kress & Co.*, 194 F. 2d 444 (C.A. 6); *Wilson Athletic Goods Mfg. Co.* v. *National Labor Relations Board*, 164 F. 2d 637 (C.A. 7); *Olson Rug Co.* v. *National Labor Relations Board*, 260 F. 2d 255 (C.A. 7); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388 (C.A. 8), certiorari denied, 332 U.S. 758; *National Labor Relations Board* v. *National Truck Rental Co.*, 239 F. 2d 422 (C.A.D.C.), certiorari denied, 352 U.S. 1016; *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 409 (C.A. 9), certiorari denied, 348 U.S. 887.

correct the misrepresentation. These requirements are not laid down by the statute. The Board has set aside elections where all three were met, but always in situations where proof of these three facts satisfied the Board that the election was not free and fair (see pp. 15–17, *infra*). The court's mistake was to accept the Board's tests as absolute principles for the court's application, rather than as a formulation of the Board's own reasons for believing that an election might not be free and fair. Proceeding on this basis, the court next adressed itself to the question whether there had been a material misrepresentation and reversed the Board's finding on this point because the Board's "construction of written documents and undisputed evidence is not binding on this court." The court then ruled that the undisputed evidence satisfied the second and third requirements for voiding an election. It therefore set aside the order of the Board without discussing the reasonableness of the Board's ultimate conclusion that the election had been free and fair.

Each of these rulings misconceives the proper function of a reviewing court. The important question concerning the Union's letter was not its abstract meaning or legal effect, but the impact which it was likely to have upon the employees' minds. This was a question calling for an informed and experienced administrative judgment directed to the ultimate issue whether it was likely to render the election unfair. Similarly, the presence or absence of an opportunity to correct the misrepresentation furnished no legal

touchstone; its absence was unimportant if other aspects of the election campaign demonstrated that the total atmosphere was conducive to freedom of choice.

Although the court below relied upon *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, nothing in that decision supports its ruling. The *Universal Camera* case is concerned with the standard of review applicable to the Board's findings of fact in unfair labor practice cases. The Court held that the scope of review under section 10(e) of the Act is the same as the scope of review under section 10 of the Administrative Procedure Act, and declared that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" (*id.* 488). This formula has not heretofore been applied to representation proceedings. The review of the findings of fact describing motives and evidence presents problems different from reviewing an administrative certification of representatives. In the former case the problem is largely one of weighing conflicting testimony, or the inferences to be drawn from testimony, under the circumstances disclosed by the record.[6] In a representation proceeding there is seldom much dispute about what happened; the agency makes a discretionary judgment based upon the evidence; the question on review is whether

[6] See *National Labor Relations Board* v. *Marcus Trucking Co.*, 286 F. 2d 583, 589–592 (C.A. 2).

that judgment was reasonable and was confined within the statutory limits.[7]

In the present case the record showed clearly what happened during the election campaign. The only question was whether the union's letter concerning fringe benefits precluded a fair election. The record did not disclose what effect the union's letter had on the employees, nor, in view of its highly subjective

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[7] For these reasons, Professor Jaffe, in his comment on the *Universal Camera* decision, stated that "it would be a drastic and unwarranted conclusion to read either Act [the NLRA or the APA] as impairing the long-standing doctrine that there are valid areas of administrative discretion and that judgment within these areas will be set aside only if unreasonable or arbitrary." Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 Harv. L. Rev. 1233, 1260 (1951). It is also significant that Section 10(e) of the Administrative Procedure Act itself recognizes a distinction between a substantial evidence question and one involving the exercise of administrative discretion. Thus, it provides that the reviewing court shall "(B) hold unlawful and set aside agency actions, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (5) unsupported by substantial evidence * * *"

The same distinction was drawn by Judge Parker in *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 758 (C.A. 4):

"The determination of bargaining representatives under the act is a matter that Congress has entrusted to the Board, not to the courts; and when, as here, a certification is called in question in connection with a petition to enforce or review an order of the Board under section 10 * * * the certification must be sustained in so far as fact questions are concerned, if the fact findings of the Board made in connection therewith are based upon substantial evidence. In so far as the certification involves the exercise of discretion, that is a matter with which we are powerless to interfere so long as the Board acts within the limits of the law."

And see *International Telephone and Telegraph Corp.* v. *National Labor Relations Board* (C.A. 9), August 28, 1961.

nature, is it likely that evidence on this issue would have probative value (cf. *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 231). Under these circumstances it was pointless to ask whether there was substantial evidence to support a finding that the employees were not misled. The Board made an independent judgment upon whether the letter, under all the circumstances of this election campaign, was likely to have affected true freedom of choice. The Board's conclusion reflected its appraisal of the objective facts measured against its standard of free and fair elections. Under these circumstances the reviewing court should only inquire whether the Board could reasonably conclude that employee free choice was not affected; if so, its judgment should not be distrubed even though the court may have reached the opposite conclusion if it were free to decide the question *de novo*.

Instead of following this course, the court below simply substituted its judgment for that of the Board. The court admittedly undertook to interpret the Union's letter *de novo* even though the Board had found it to have a different meaning. Finding that the Union had made a misstatement in the closing moments of the election campaign, the court compounded the error by ruling that this must necessarily have had an effect on the employees and impaired the validity of the results even though, as we show *infra*, pp. 16–17, the opposite conclusion had been reached by the Board and was not unreasonable.

3. The Board does not set aside every election involving untruthful statements by one of the parties.[8] The policy of nonintervention rests on the realistic

[8] See cases cited at J.A. 69, notes 11, 13.

premise that the employees, as a result of their common sense and experience in political elections, have learned that hyperbole and inaccuracies usually accompany an intense campaign and therefore can be trusted to evaluate and discount the conflicting claims that are made preliminary to a representation election. Where special circumstances occur, however, which impair the ability of the employees to evaluate the propaganda—e.g., where both a material misrepresentation has been made so soon before the election that the other side could not reply *and* the employees in all probability gave particular weight to the misrepresentation because the party making it had special knowledge of the true facts—this premise is no longer true, and the Board will ordinarily require a new election. See *Merck & Co.*, 104 NLRB 891, 892; *Gummed Products Co.*, 112 NLRB 1092, 1093–1094. But the Board could reasonably conclude that the employees were not misled here, and thus that a new election was not necessary. Although the alleged misstatement occurred in the closing moments of the campaign so that the Company did not have a chance to reply prior to the election, no reply was required to counter the effect of the Union's statement. As the Board pointed out (J.A. 92–93, 68–71), the Company had outlined its position that past employee benefits were the result of its voluntary action and not of collective bargaining, in the series of letters sent to the employees. The Board (J.A. 67–68) read the Union's letter to claim only that *some* of the benefits were the result of Union negotiations. As so interpreted, it is neither incorrect nor did it conflict with

the contentions made by the Company in its series of letters. Alternatively, the Board found (J.A. 68–71) that, even if the Union's letter be read as claiming that *all* the benefits were attributable to the Union's efforts, as did the court below, the employees were, at most, presented with conflicting contentions which they were free to evaluate. The Company was claiming that the benefits were the result of its voluntary action and the Union, that they were the result of collective bargaining. Now was it likely that the employees would attribute more significance to the Union's version than to the Company's. Since the Company was a party to the past negotiations, the employees could not help but recognize that it was in as good a position as the Union to know what had occurred. Moreover, as the Board noted, the benefits in question themselves showed that some of them could not conceivably have been initiated by the Union (see J.A. 68, n. 9). In these circumstances, it was clearly "within the Board's province to find" (*National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123) that the Union's inaccuracy (if any) on this "not too important dispute"[9] did not affect the freedom or fairness of the election.

4. As shown in the petition in *Mattison* (No. 74, October Term, 1960, pp. 7–8, 11), thousands of representation elections are conducted each year by the Board. Under the decision of the court below, reviewing courts might set aside many of them on the

[9] The controversy here was so characterized by the Sixth Circuit in *Cross Company* v. *National Labor Relations Board,* 288 F. 2d 188, in distinguishing it from the situation in that case.

basis of exaggerated or erroneous campaign claims despite the lack of any evidence showing actual prejudice, and despite the finding of the Board, based on its extensive experience in election matters, that the erroneous claims did not affect the result. If these elections are set aside because of the reviewing court's evaluation as to when prejudice is likely to result, the election machinery, which the statute provides for the speedy resolution of representation questions, will be delayed by time-consuming litigation. This, in turn, will impair the collective bargaining process, since delay in determining the employee representatives with whom the employer must bargain encourages industrial unrest. It is therefore important to the overall administration of the Act that the decision below be reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LEE M. MODJESKA,
Attorney,
National Labor Relations Board.

SEPTEMBER, 1961.

APPENDIX A

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.
>
> * * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting

in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the

order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

September Term, 1960—April Session, 1961

No. 12857

CELANESE CORPORATION OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

June 14, 1961

Before SCHNACKENBERG and CASTLE, *Circuit Judges*, and GRUBB, *District Judge*

GRUBB, *District Judge.* The judgment heretofore entered in this case, *Celanese Corporation of America* v. *National Labor Relations Board,* 279 F. 2d 204 (7th Cir. 1960), has been vacated by the Supreme Court, 365 U.S. 297 (1961), and the case has been remanded for consideration by this court in light of *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123 (1961). Reference is made to the previous decision in 279 F. 2d 204 for a statement of facts.

The case now turns on the question as to the scope of judicial review of orders of the Board respecting the validity of representation elections.

Section 10(e) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 160(e), which is similar to the provisions of the Administrative Procedure Act, requires that the court determine the substantiality of the evidence supporting a Labor Board decision on the record as a whole.

In interpreting this section, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), admonishes the Courts of Appeals of their duties in reviewing Labor Board orders. The courts are to assume more responsibility for the reasonableness and fairness of Board decisions than some courts have previously shown. It is said on pages 490 and 491 that:

> * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.
>
> * * * * *
>
> * * * Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. * * *

There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946). These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies

in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.

Unless or until Congress changes the language of the statute or the Supreme Court changes its interpretation of the application of the statute, this court is bound by the rule of the *Universal Camera* case.

On oral argument counsel for the Board took the position that the scope of review by Courts of Appeals of orders of the Board as to representation elections was extremely narrow and that the Board's orders should not be set aside unless clearly arbitrary or capricious. Counsel could not think of an example of extreme arbitrariness or capriciousness which, in his opinion, would warrant setting aside an order. This position is far from the interpretation placed on the statute by the United States Supreme Court in the *Universal Camera* case.

In accordance with the "wide discretion" entrusted to it, the Board has adopted the policy to set aside a representation election where it appears that (1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts, and (3) no other party had sufficient opportunity to correct the misrepresentations before the election. *United States Gypsum Company*, 130 N.L.R.B. No. 99; *The Cleveland Trencher Company*, 130 N.L.R.B. No. 59; *Kawneer Company*, 119 N.L.R.B. 1460; *The Calidyne Company*, 117 N.L.R.B. 1026, 1028. Where these ele-

ments are present, the Board has found that the legitimate limits of campaign propaganda have been exceeded and has set aside the election on the ground that it does not reflect the free desires of the employees without further requiring that prejudice to the fairness of the election be shown.

In the case before the court, the validity of a representation election was put in issue by allegations as to the three elements prejudicial to the fairness of an election under the doctrine set forth above. Without making a determination as to the truth or falsity of the statements in question, the Board found that the additional elements were lacking in the case and concluded that the election was valid.

This court, on the entire record encompassing a series of letters addressed to the employees, including the challenged eve-of-the-election letter as well as certain undisputed testimony concerning collective bargaining between the employer and the union at other plants, holds that the findings and conclusions of the Board as to the validity of the election were not supported by substantial evidence on the record as a whole.

This court's prior opinion was principally concerned with the question of the truth or falsity of the challenged statement. The statement as to the source of fringe benefits was material to voting employees. The union was a party in an authoritative position to know the true facts as to benefits it falsely claimed to have gained through collective bargaining. The union would not have made such statements if it had not believed that they would be material in influencing the vote. There was no time for rebuttal of the false statement.

On this remand, the Board has not challenged this court's finding that there were misrepresentations of

fact. The Board's construction of written documents and undisputed evidence is not binding on this court. An election must be set aside where, as here, the three elements set forth above are present. Under these circumstances, there is interference with the employees' freedom of choice of bargaining representative. It has been conceded by the Board that it would have been as improper for the employer to have canvassed the employees to ascertain why or how they voted as it would be to similarly question voters after casting their secret ballots in other elections.

Considering the instant case in light of *National Labor Relations Board* v. *Mattison Machine Works, supra,* it appears that in the latter case a conclusion of prejudice to the fairness of the election was based on trivial administrative irregularities. In *Mattison* this court refused to enforce the order because the Board's notices of election contained a minor and unconfusing mistake in the employer's corporate name, which error the Supreme Court held did not affect the fairness of the election in the absence of a contrary showing by the employer. However, this court can now find no basis for holding that "trivial irregularities of administrative procedure" and material misrepresentations of fact made under the circumstances revealed by the record in the instant case are of the same kind and nature, equally requiring further evidence in support of prejudice to the fairness of the election. This is particularly true when a change of two votes would have changed the outcome of the election.

For the foregoing reasons the order of the Board is hereby set aside and enforcement is denied.

United States Court of Appeals for the Seventh Circuit

CHICAGO 10, ILLINOIS,
Wednesday, June 14, 1961.

No. 12857

CELANESE CORPORATION OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*, Hon. LATHAM CASTLE, *Circuit Judge*, Hon. KENNETH P. GRUBB, *District Judge*

This cause came on to be heard on the record from the National Labor Relations Board and was argued by counsel, subsequent to remandment to this Court by the Supreme Court of the United States for further proceedings in conformity with the opinion of said Court.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the National Labor Relations Board on November 25, 1959, be, and the same is hereby set aside; and enforcement of said order is hereby denied, in accordance with the opinion of this Court filed this day.

In the United States Court of Appeals for the Seventh Circuit

September Term, 1959—April Session, 1960

No. 12857

CELANESE CORPORATION OF AMERICA, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION OF THE BOARD FOR ENFORCEMENT OF SAID ORDER.

June 16, 1960

Before SCHNACKENBERG and CASTLE, *Circuit Judges,* and GRUBB, *District Judge.*

GRUBB, *District Judge.* On petition to review and set aside an order of the National Labor Relations Board and cross-application of the Board for enforcement of said order.

The order in issue requires the Celanese Corporation of American (hereinafter called the "Company") to bargain collectively with the Textile Workers Union of America, AFL-CIO (hereinafter called the "Union"), on behalf of certain of the Company's employees at its Point Pleasant plant, following Board certification of the Union as the employees' majority representative. The Company based its refusal to bargain on the alleged invalidity of the election and certification arising out of pre-election activities by the Union.

In the election held on March 12, 1958, among the approximately forty-eight employees in the bargaining unit at the Point Pleasant plant, twenty-five votes favored the Union while twenty-two opposed it.

During the pre-election period the Company sent a series of eleven letters, addressed individually to each employee who was involved in the election and signed on behalf of the Company by Paul C. Pearson, Plant Manager, Point Pleasant plant. The first letter, dated February 14, 1958, expressed the Company's view that the employees did not need the Union to speak on their behalf in their relationship with the Company. Subsequent letters in support of this view explained and described Company policies as to employee benefits and working conditions. The Company's final letter, dated March 8, 1958, summarizes the previous correspondence as dealing with policy in respect to job security, working conditions, seniority and promotions, group insurance, vacations, holidays, and job descriptions. It continues to describe changes in the wage program and wage increases since the plant began operations in 1956 and further states that these changes were made through individual progress and "not because a labor organization demanded that they be done."

The Union replied to the Company's communications with two letters, the latter of which, dated March 10, 1958, reads in part as follows:

> DEAR FRIEND: The repetitious letters sent to you by the Plant Manager seem to betray an inner sense of guilt. In his letters, Mr. Pearson seems to be taking credit for almost everything but the Declaration of Independence.
>
> He says that all of the fine fringe benefits show the Company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes, as well as other plant conditions, were won through collective bargaining and in many instances over the initial opposition of the Company.

The letter was signed by Morris Riger, Regional Director.

It was stipulated that about twenty copies of this letter were delivered by hand to employees at their homes on the afternoon of March 10, 1958, and that the remainder were deposited in the mail box outside the Point Pleasant Post Office about 6:30 p.m. on March 10, 1958. The Company first saw a copy of this letter about 1:30 p.m. on March 11, 1958. The plant manager testified that a number of employees were not readily available at this time or in the interval before the polls opened at 6:30 a.m. on March 12, 1958.

The Company objects to the election on the ground that the above-quoted portion of the Union's letter contained a material misrepresentation of fact, made within twenty-four hours of the election at a time which did not permit the Company to acquaint the employees of the misrepresentation. A hearing was had on this objection in conjunction with the unfair labor practice proceeding based on the Company's refusal to bargain.

The Trial Examiner held that the challenged letter did not invalidate the election. He concluded that the letter could reasonably be read as a claim by the Union that "some" Celanese fringes were won through collective bargaining when viewed in the light of the Company's previous letters since some of the benefits discussed were of such nature that the employees could not reasonably have believed that the Union was claiming credit for them. Even if the Company's interpretation of this language as reading that "all" Celanese fringes were won through collective bargaining were accepted, the Trial Examiner believed that the Union's claim at most amounted to a "half-truth." He did not make a specific finding as to the truth

or falsity of the Union communication. The Board adopted the Trial Examiner's report and recommendation and issued the order being reviewed here.

This court does not agree with the holding of the Board. The content of the Union's communication to the employees and the manner of its distribution go beyond the bounds of "legitimate propaganda." These activities fall below the standard to be observed in representation elections as set forth by the Board and as approved by the courts. See *The Gummed Products Company,* 112 N.L.R.B. 1092; *The Matter of General Shoe Corp.,* 77 N.L.R.B. 124; and *Kearney & Trecker Corp.* v. *National Labor Relations Board,* 210 F. 2d 852 (7th Cir. 1954).

In light of the immediately preceding reference to "all of the fine fringe benefits," the challenged statement cannot reasonably be construed to refer to less than "all" Celanese fringes. If the author had intended to speak of some or several benefits, he would necessarily have had to employ a limiting adjective. The record establishes that some Celanese benefits, as for example the group insurance and retirement pension plans, were initiated and maintained unilaterally by the Company, while other benefits, such as vacations, holidays, pay for jury duty and funeral leave, had been the subject of collective bargaining by the Company and labor organizations at other plants. There had been no union and no negotiations with any union concerning the particular employees involved at the Point Pleasant plant. Apparently the Union is referring to some dealings of the Company and unions at other plants.

The Trial Examiner had concluded that the Company's letters carried the implication that the Company voluntarily granted the benefits discussed in the correspondence without benefit of collective

bargaining. The claim in the Company's final letter that certain changes were made because of individual progress rather than as a result of a union demand refers to changes in wages discussed immediately preceding this statement. Clearly, the Company was attempting to convey the impression that the employees were enjoying existing benefits and working conditions without present Union representation at the Point Pleasant plant, while the Union points out that these gains have been derived as a result of prior Union activities. In this context, a claim by the Union that "all" Celanese fringes were the result of collective bargaining is significant and material. Where it has been established that some of the fringes had not thus been obtained, the claim is a misrepresentation of fact, the falsity of which was known to the Union. Characterizing the claim as a "half-truth" does not confer upon it the veracity demanded in respect to material statements made immediately prior to a representation election. *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board,* 261 F. 2d 613 (7th Cir. 1958). Nor may a false statement be excused on the ground that it was in answer to prior Company statements carrying possibly erroneous implications. See *United Aircraft Corp.,* 103 N.L.R.B. 102.

The misrepresentation of fact here does not fall within the pre-election publicity "prattle" condoned in *Olson Rug Co.* v. *National Labor Relations Board,* 260 F. 2d 255 (7th Cir. 1958), where the challenged statements concerned predictions of the future.

The Trial Examiner conceded that the Company did not have sufficient time before the election to reply to the Union's final letter. The election was close; a shift of two out of forty-seven votes cast would have altered the result. Under the facts of

this case, it cannot be said that the employees were acting under a correct understanding of the facts with respect to the manner in which employee benefits were gained at the time they cast their ballots. The election must, therefore, be held invalid. See *National Labor Relations Board* v. *Trinity Steel Co., Inc.*, 214 F. 2d 120 (5th Cir. 1954).

This conclusion makes unnecessary a consideration of other objections raised by the Company.

Order set aside and cross-application for enforcement denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 401

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

CELANESE CORPORATION OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

GERARD D. REILLY
JOSEPH C. WELLS
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington 5, D. C.

EVERETT W. KRAMER
Celanese Corporation of America
522 Fifth Avenue
New York, New York

Of Counsel:

REILLY AND WELLS
1120 Tower Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Question Presented	2
Counter-Statement of the Case	2
A. The Disputed Election	2
B. The Proceedings before the Board	6
C. History of the Case in Review	10
Argument	12
1. The Court Below Gave Full Effect to the Rule of the Mattison Case	13
2. Petitioner's Position Ignores the Purpose of Section 9(d) of the Act	16
3. The Holding of the Court Below Was Plainly Correct	23
Conclusion	27
Appendix	

AUTHORITIES CITED

Cases:

Calidune Co., 117 NLRB 1026 8
Cross Company v. *N.L.R.B.*, 286 F. 2d 799, rehearing denied 288 F. 2d 188 (CA 6) 22, 27
Gummed Products Co., 112 NLRB 1092 ..... 8, 19
Leedom v. *Kyne*, 358 U.S. 184 ..... 16, 17
Merck & Co., 104 NLRB 891 19
N.L.R.B. v. *A. J. Tower Co.*, 329 U.S. 324 ..... 14, 20
N.L.R.B. v. *Mattison Machine Works*, 365 U.S. 123 ..... 1, 2, 10, 11, 13, 14, 15, 16
N.L.R.B. v. *National Plastic Products*, 175 F.2d 755 (CA 4) 14, 22
Radio Officer's Union of Commercial Telegraphers Union v. *N.L.R.B.*, 347 U.S. 17 21
Reiss Associates, Inc., 116 NLRB 217 8

Page

Service v. *Dulles*, 354 U.S. 363 22
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 22
United States Gypsum Co., 130 NLRB No. 99 .....8, 26
Universal Camera Corp. v. *N.L.R.B.*, 340 U.S. 474 11, 12, 13, 20

STATUTES:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. § 141 *et seq.*
Section 8(a)(5) 7
Section 9(d) 16, 17
Section 10(e) 16, 17
Section 10(e) 12, 17
Section 10(f) 12, 17

Administrative Procedure Act., 60 Stat. 237, 5 U.S.C. § 1001 *et seq.* 12

MISCELLANEOUS:

Bureau of Labor Statistics Bulletin No. 1225, *Fringe Benefits Under Collective Bargaining* 24

IN THE

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OCTOBER TERM, 1961

No. 401

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals, 279 F. 2d 404, and its subsequent opinion on remand, 291 F. 2d 224, are reprinted in the petition for certiorari (App. to Pet., pp. 22-33). The decision of this Court, 365 U.S. 297, remanding the case to the court of appeals and the text of its opinion in *National Labor Relations Board* v. *Mattison Machine Works*, 365 U.S. 123,

which that court was directed to consider, appear in the appendix to this brief (App. A and B, *infra*, pp. 1a-2a). The findings of fact, conclusions of law, and order of the Board (J.A. 85-97, 103-105)[1] are reported at 125 NLRB 352. The Board's decision in the representation proceeding (J.A. 64-72), which forms part of the record here, is reported at 121 NLRB 303.

QUESTION PRESENTED

Petitioner's phrasing of the "Question Presented" implies that this Court had previously held that the court below had "misconceived" the function of a reviewing court when it is apparent that all this Court had done was to send the case back for clarification. Accordingly, it is submitted that the real question is as follows:

Whether the court below, when the case was remanded to it "for consideration in the light of *Labor Board* v. *Mattison Machine Works*", 365 U.S. 123, correctly concluded that it was required to determine whether on the record as a whole there was substantial evidence to support the challenged order of the Board and to set aside the order of the Board in the absence of such evidence.[2]

COUNTER-STATEMENT OF THE CASE

A. The Disputed Election

On March 12, 1958 the Board, acting upon a petition of the Textile Workers Union, AFL-CIO, conducted an election among the employees of the re-

[1] "J.A." refers to the portion of the record printed as the Joint Appendix in the court below.

[2] Respondent does not differ with what Petitioner states with respect to "Jurisdiction" and "Statute Involved".

spondent Company at Gallipolis Ferry, West Virginia, one of several manufacturing establishments operated by respondent (J.A. 6, 107, 111). Of the forty-seven (47) ballots cast, twenty-five (25) favored the Union and twenty-two (22) opposed the Union (J.A. 6). There were no void or challenged ballots (J.A. 6). A change in two (2) votes would have changed the results of the election.

Prior to the election eleven (11) letters were circulated by the Company to the employees, designed to review the facts concerning wages, fringe benefits, and working conditions of the employees. In brief, these letters explained the Company's method of maintaining full employment even during business dips by the use of outside contractors whose services could be eliminated during periods when production was reduced (J.A. 36-38); the disciplinary policies with respect to job security (J.A. 39-40); promotions through the posting of job opportunities (J.A. 41-43); the hospitalization and group insurance program, the cost of which was borne entirely by the Company (J.A. 43-44, 48-51, 51-54), and its retirement program (J.A. 43-44); the Company efforts to provide better working conditions and conveniences for its employees, including its financial assistance to a recreational club for employees (J.A. 43-44); its practice of avoiding layoffs by assigning work to employees in jobs other than their primary ones (J.A. 45); its seniority policies and welder training program (J.A. 46-47); pay for jury duty, funeral leave, premium pay for second and third shifts, and two-and-a-half times pay for work performed on recognized holidays (J.A. 48-51); its wage program and wage rates (J.A. 48-51, 55-58).

Three of the Company's letters were devoted in whole or in part to the Company's group hospitalization, surgical, and life insurance programs (J.A. 43-44, 48-51, 51-54).[3]

The union distributed two letters to the employees (J.A. 59-63). The second letter (to which the Company objected) was dated March 10, 1958 (J.A. 61). It was delivered by hand to some 20 of the employees on March 10 (J.A. 92, 115) and was presumably received by the rest of the employees on March 11, the day before the election, since the remainder of the letters sent to the employees were deposited in the mail box near the plant at 6:30 P.M. on March 10 (J.A. 92, 115).

The letter claimed that "Celanese fringes" and "other plant conditions" had been won by the union through collective bargaining (J.A. 61), stating in part:

> ". . . He [the plant manager] says that *all of the fine fringe* benefits show the Company's interest

---

[3] The supposedly objective description of these letters contained in the petition for certiorari under the caption "Statement" is marred by one glaring inaccuracy when it refers to a summary in the final Company letter of "the various benefits discussed in earlier letters" and a restatement of "its attitude toward them as follows (JA 56):

> "These changes were made because of our progress as individuals working for our Company and not because a labor organization demanded that they be done."

As the text of this letter reveals, the changes in question related to certain revisions in the pay and holiday schedule at the particular plant described in some detail in the two paragraphs immediately preceding the sentence quoted in the Petition (p. 3). In other words, this sentence did not refer at all to the "various benefits discussed in earlier letters". This same contention was advanced by Board counsel in the first argument before the court below and was rejected by the court (see App. B, Pet., p. 32).

> in your concern. This could be something less than the truth, for the fact is that *Celanese fringes*, as well as other plant conditions, were won through collective bargaining, and in many instances over the initial opposition of the Company.
>
> "Mr. Pearson, the plant manager, does not know much about this, since many of the gains won by the Union for Celanese workers date back to a time when he was just a youngster . . ." (Italics supplied)

The Company was not informed of this letter until about 1:30 P.M. on March 11, 1958 (J.A. 92, 113), the day preceding the election. At this time, eight employees were not in the plant (J.A. 112). By 3:00 P.M.—one and a half hours after the letter reached the Company—five additional employees, comprising the production day shift, had left the plant (J.A. 113). By 4:00 P.M. seventeen more employees, comprising the bulk of the maintenance and warehouse group, had completed their shifts (J.A. 113). By 6:00 P.M. only the regular shift of six people remained in the plant (J.A. 113). In short, by 4:00 P.M. 30 employees had left the plant for the day; by 6:00 P.M. the number had increased to 35 employees. None of the employees who had left the plant was scheduled to reenter the plant before the day of the election, when the polls were scheduled to open at 6:30 A.M. (J.A. 113).[4]

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[4] The trial examiner, whose decision and recommendations were adopted by the Board, conceded that ". . . the Respondent did not have sufficient time before the election to reply to the Union letter . . ." (J.A. 92).

B. The Proceedings Before the Board

The Company filed objections to the election, alleging that on the eve of the election the Union had circulated among the employees a letter which contained misrepresentations of fact on material issues involved in the election, thereby affecting the results, so that the tally of ballots did not comprise a true determination of the wishes of the employees with respect to representation by the Union (J.A. 4-5).

On April 7, 1958 the Regional Director of the Board issued a report on objections (J.A. 6-18). The report contained no flat findings of fact concerning the truth or falsity of the Union's assertions, but rather recommended that the Board overrule, without hearing, such objections on the ground that they did not raise "any material or substantial issue with respect to the results of the election" (J.A. 11).

The Company filed exceptions to the Regional Director's Report, together with a supporting brief and request for oral argument before the Board (J.A. 19-63). In support of its contention that the Union misrepresented the origin of employee benefits enumerated in the Company letters, the Company submitted in its brief[5] that it had provided for its employees unilaterally as a result of Company policy rather than collective bargaining a comprehensive retirement plan and a program of group insurance covering hospital, surgical and polio expense benefits, life insurance, accidental death and dismemberment benefits, accident and

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[5] Inasmuch as no hearing had been held on the issues raised by the Company, the only means whereby the Company could support its contention was through written argument to the Board and its representatives.

sickness benefits (J.A. 27),[6] as well as other important fringes (J.A. 27, 28). It pointed out that these benefits had not been "won through collective bargaining" in any of its plants as the Union had erroneously claimed in its letter of March 10 (J.A. 28).

On August 6, 1958, without affording the Company any hearing, the Board denied the request for oral argument, overruled the Company's objections, and issued a certification that the Union was the majority representative of the employees (J.A. 64-72).

Thereafter, the Company declined to meet with the Union for the purpose of collective bargaining because it believed that the Union did not represent a majority of the employees in the stipulated unit (J.A. 75-76, 131-132). A complaint issued charging a refusal to bargain under Sec. 8(a)(5). (J.A. 72)

In the subsequent hearing, the Company pointed out that the Board's own stated election policies required the setting aside of an election where—

(1) there has been a material misrepresentation of fact,

(2) this misrepresentation was made by a party who had special knowledge of, or was in an authoritative position to know the true facts,

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[6] The aforementioned benefits were enumerated in the letters sent by the Company on February 25, March 4 and March 6 (J.A. 43, 49, 51-54).

(3) no other party had sufficient opportunity to correct the misrepresentation before the election.[7]

The Company then produced evidence to show that the chief fringe benefits it had emphasized in its letters, viz., the employee hospitalization, medical and life insurance plan and the retirement program, had never been the subjects of collective bargaining in any of its plants (J.A. 123-124) and accordingly the Union's last minute boast that "Celanese fringes" had been won through collective bargaining amounted to a material misrepresentation.

On the second point the Company's evidence showed that the Textile Workers Union was known to be the bargaining representative of employees in several other Celanese plants (J.A. 120) and consequently the workers in this plant might well assume that it spoke with knowledge of the true facts. Evidence was also presented to demonstrate that time did not permit any rebuttal of the false statement before the polls opened (J.A. 111-115), thereby establishing the third element.

The trial examiner, although conceding that there was no opportunity for rebuttal, failed to make any firm finding on the issue of whether the union had made a material misrepresentation. Following the lead of the Board in its opinion dismissing the objec-

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[7] These standards, previously announced in such cases as *Gummed Products Co.*, 112 NLRB 1092; *Reiss Associates, Inc.*, 116 NLRB 217; *Calidyne Co.*, 117 NLRB 1026, and elaborated upon in successive Annual Reports of the Board, are still the operative tests. See *United States Gypsum Co.*, 130 NLRB No. 99, App. C of this brief, pp. 2a-12a. These were the rules the court below accepted when the case was before it for remand. Petitioner concedes that they were in effect all during the relevant period of this case, but contends that a reviewing court has no authority to inquire into their application (Pet for Cer., p. 12).

tions (J.A. 64, 67), the trial examiner advanced the view that the union's letter should be read as claiming that *some* rather than *all* of the benefits granted by the Company were the result of collective bargaining with the union (J.A. 89).

Apparently aware that such a reading was certainly not literal and obviously would not have produced the impression upon the employees the Union was trying to convey, the trial examiner reasoned that even if the Union was claiming credit for all enumerated benefits, "the Union's claim at most amounted to a half truth" (J.A. 91). He then went on to find that the other two factors were not present because—(a) it was unlikely, he said, that the workers would attach special weight to the union's version as against Respondent's version, since they knew that Respondent as well as the union must have been a party to the bargaining in question (J.A. 92); and (b) although agreeing that the Company did not have sufficient time before the election to reply to the union letter (J.A. 92), such an opportunity was unnecessary, he said, because the Company had already presented its version of the facts to the employees (J.A. 92-93). This conclusion was based on the finding that "implicit" in the Company's letters is the theme that "the employee benefits recited . . . were voluntarily granted by Respondent alone without benefit of collective bargaining" (J.A. 93).

In its exceptions, Respondent pointed out that there was nothing in the record to support this finding, for at no time had the Company advanced the claim that the benefits in effect at the Gallipolis plant had not been the subject of collective bargaining at other locations and accordingly the last minute letter of the union had injected a new issue upon which it had no

opportunity to comment (J.A. 101). Nevertheless the Board, without adverting to this point, adopted the trial examiner's findings and intermediate report *in toto* (J.A. 103-104).

C. History of the Case in Review

On June 16, 1960, the Court of Appeals for the Seventh Circuit set aside the Board's order. It found that the disputed union letter could not be reasonably read as claiming credit for only "some of several" fringe benefits and held that the union's claim constituted a significant and material misrepresentation. It further observed that "[c]haracterizing the claim as a 'half-truth' does not confer upon it the veracity demanded in respect to material statements made immediately prior to a representation election".

Noting the trial examiner's finding of a Company implication that it had voluntarily granted the benefits without collective bargaining, the court pointed out that the Company's reference to the absence of a union demand in the final letter referred only to the wage changes discussed in that document, and that what the Company was conveying to the employees was the fact that they were enjoying existing benefits without union representation at their own plant (Pet. App. B, pp. 31-32).

Just before the summer recess in 1960, this Court granted a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit in *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, a case involving an inaccurate designation of the employer's name on election notices. Thereafter, the Board filed a petition for a writ of certiorari to review

the Seventh Circuit's decision of June 16, 1960 in the instant case.

Shortly after this Court reconvened for its fall term in 1960, it heard oral argument in *Mattison*. Board counsel on that occasion contended that the court of appeals decision in this case was also based on the same rationale. Because the petition for the writ was still pending before this Court at that time Celanese counsel had no opportunity to reply.

On January 23, 1961, this Court reversed the judgment in *Mattison* in a *per curiam* opinion. On February 20, 1961 a writ of certiorari was granted in the instant case, and without a hearing on the merits, the judgment of the Seventh Circuit was vacated and remanded to that court for consideration in light of the *Mattison* decision.

Upon remand the court of appeals, after receiving memoranda filed by the parties and hearing oral argument, issued its decision on June 14, 1961. Explicitly considering the case in the light of the *Mattison* decision, the court concluded that the Board order should be set aside. This time the court precisely articulated its theory governing review of Board orders, with particular reference to and adoption of the standard enunciated in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. It noted that the Board is given wide discretion in the promulgation of rules governing the conduct of elections. Then turning to the application of the Board's rule in the instant case, the court held that the findings and conclusions of the Board with respect to the application of the rule which it had promulgated were not supported by substantial evidence on the record considered as a whole.

ARGUMENT

It is submitted that the reasons advanced by Petitioner for granting a writ of certiorari are not well taken. Its contention here is not that the factual findings assigned as the basis for the Board's refusal to hold that its rules against pre-election misrepresentations were violated, were supported by substantial evidence in the record as a whole. It argues that despite the fact that this is the standard for review prescribed by Sections 10(e) and (f) of the Act, the court below erred in applying this test where such findings related to issues arising in a representation proceeding. Petitioner regards such findings as binding upon reviewing courts unless "arbitrary and capricious."

Acceptance of this thesis would create a limitation upon the authority of courts of appeal in Section 10(e) and (f) proceedings which does not appear in the text of those subsections nor is suggested in any way by the opinion of this Court in the leading case, *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. Moreover, the proposed new standard is also at odds with the Administrative Procedure Act. While it is true that Section 10 of the Administrative Procedure Act does, (5 U.S.C. § 1009), as petitioner points out (Pet., p. 14, n. 7), recognize a distinction between a substantial evidence question and one involving an abuse of administrative discretion, Section 10(B)(e) of that Act provides that an agency action shall be set aside by a reviewing court if the findings and conclusions of the agency are found to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (5) unsupported by substantial evidence . . .". If petitioner is correct, clause (5) of Section 10(B)(e) has no application to the pro-

ceedings in the court below. This court has held precisely the contrary. *Universal Camera*, 340 U.S. 474 at 487 and 490.

1. The Court Below Gave Full Effect to the Rule of the Mattison Case

Petitioner relies upon this Court's holding in the *Mattison* case as support for its novel proposition that the Board's decision here must stand unless its action was "arbitrary and capricious" even if unsupported by substantial evidence.

Far from constituting a wide reaching exposition of general principles applicable to the review of Board orders based in part on findings in a representation proceeding, the *Mattison* decision was a carefully limited one. The Court said that the "notices of election contained a minor and unconfusing mistake in the employer's corporate name"; sustained the finding of the Board that such an occurrence "had not affected the fairness" of the election; and held that in the absence of a showing of "prejudice to the fairness of the election such trivial irregularities of administrative procedure" did not justify the reversal of the Board by the Seventh Circuit.

From this short admonition Petitioner has somehow developed the notion that the Board's subsidiary findings in a representation matter, even though plainly at variance with the evidence, are immune from judicial review.

Any such interpretation of *Mattison* is far fetched. The court of appeals had acknowledged in the decision later reversed by this Court, that "it may well be that the irregularity complained of resulted in no confusion to respondent's employees" and declined to "give the stamp of our approval to the Board's rejec-

tion of the objection as 'nonprejudicial error' when there is nothing in the record to support such a conclusion". It was presumably the court of appeals' readiness to reject a finding of the Board in the absence of a showing by the objecting party that the irregularity operated more to its detriment than that of the winning side which precipitated the reversal by this Court.

Mattison is further distinguished by its concern solely with the mechanics of an election. It is in these phases of election procedure that the Board's rulings with respect to voting eligibility have received some special weight. *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, urged by the Board as support for its position here, was merely an affirmance of a ruling that the company by waiving its right under Board rules to challenge a non-employee at the polls was thereby estopped from protesting the inclusion of this vote in the tally of ballots.[8]

The Board, however, would ignore the vital distinction between the administrative discretion granted it in determining the kind of bargaining units that are appropriate or in framing rules regarding the mechanics of an election, on the one hand, and its duty of passing upon evidence in a particular case respecting an asserted deviation from its unit definitions or its election rules. The latter is a fact-finding function and if such findings are later used as the basis of an unfair labor practice order, they are subject to judicial reversal if not supported by the kind of evidence the statute requires.

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[8] Similarly the propriety of rules relating to such mechanics as the payroll date and voting eligibility rather than a failure to apply them constituted the issue before the court in *N.L.R.B.* v. *National Plastic Products*, 175 F. 2d 755, from which Judge Parker's quotation is cited in the Petition.

In the *Mattison* case, moreover, the Board did have substantial evidence for its holding that the incorrect description in the name of the company was not prejudicial to the party protesting the election result, viz, (1) the inaccuracy was so slight that it could scarcely have been inferred that the employees would have thought that some company other than their own was involved, and (2) if there was any confusion, it would scarcely operate to the disadvantage of one side rather than the other. Hence in referring to "the absence of any contrary showing by the employer", this Court was in effect saying that the Board's findings in *Mattison* had met the statutory test.

The record in the instant case, however, is clearly distinguishable. Here, as the court below noted with specific reference to this Court's observations in *Mattison*, the challenge to the election results was not based on some showing of "trivial irregularities", but rather upon "material misrepresentations of fact". The Board's finding to the contrary rested solely upon a distorted and strained reading not only of the union's letter but also of the company's circulars. The testimony offered here by the employer deprived the Board findings of substantial evidentiary support and demonstrated that under the ordinary inferences the Board itself would draw, the fairness of the election was prejudiced to the disadvantage of the respondent.

Accordingly it is clear that the court below did take into account in its rehearing of this case, all the factors mentioned by this Court in *Mattison*—"triviality", "lack of prejudice", "absence of a contrary showing by the party on whom the burden of proof rested"—as grounds for deferring to the Labor Board's judgment, even though it might have disagreed with it. It

did not, it is true, conclude that it was also under a duty to sustain Board findings devoid of substantial evidentiary support. But it is also plain that the *Mattison* opinion, which it had been directed to consider, neither advised nor hinted at the adoption of so narrow a course of action.

2. Petitioner's Position Ignores the Purpose of Section 9(d) of the Act

The Board has come full circle in its campaign to render any of its actions in representation proceedings immune from judicial review. In *Leedom* v. *Kyne*, 358 U.S. 184, the Board argued that the courts had no jurisdiction to enjoin a certification based upon a direction of election which, *ex hypothesi*, was contrary to the Act, urging that the challenge to its action could only be considered by the courts if the parties refused to abide by the certification and were subsequently adjudicated by the Board in a final order under Section 10(e) of the Act to have committed an unfair labor practice. It was pointed out that under Section 9(d) of the Act, if such a final order were based in whole or in part upon findings in a representation proceeding, the record of such proceeding would be incorporated in the transcript of the unfair labor practice proceeding. This is precisely what was done in the instant case.[9]

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[9] Sec. 9(d) "Whenever an order of the Board made pursuant to section 10 is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

Implicit in the Board's contention in *Leedom* v. *Kyne* was that a party aggrieved will ultimately have an opportunity for complete judicial review under this statutory scheme, if his objections to the validity of the certification are overruled by a Board order holding that there had been a refusal to bargain. The dissenting opinion of Mr. Justice Brennan (with whom Mr. Justice Frankfurter joined in that case) was predicated upon the premise that since Section 9(d) preserved an opportunity for judicial review in the usual course of a petition for enforcement under Section 10(e), or a petition for relief under Section 10(f), Congress had not intended any judicial remedy against improper certifications unless the findings upon which they were based were subsequently drawn into issue in a Section 10(*e*) proceeding. With obvious inconsistency, however, the Board is now insisting that even the indirect review of a representation finding, which the Board told this Court in the *Kyne* case was available under the circumstances specified in Section 9(d) of the Act, is not obtainable except where a question of arbitrary or capricious action is present.

Petitioner's theory of the role of a reviewing court is a strange one. Paradoxically the Board now assails the court of appeals for applying the Board's own rules for determining whether or not an election reflects the free choice of the employees. It takes the court to task for ruling that an election must be set aside if the three requirements laid down by the Board are met, viz., (1) a material misrepresentation of fact (2) coming from a party in an authoritative position to know the true facts (3) at a time when the other party would have no opportunity to correct the misrepresentation, and says (Pet. 12):

> "The Court's mistake was to accept the Board's tests as absolute principles for the court's application, rather than as a formulation of the Board's own reasons for believing that an election might not be free and fair. . . .
>
> "The important question concerning the union's letter was not its abstract meaning or legal effect, but the impact which it was likely to have upon the employees' minds. This was a question calling for an informed and experienced administrative judgment directed to the ultimate issue whether it was likely to render the election unfair."

These quoted portions of the Board's petition give a misleading picture of the grounds on which the Board's decision rested.

It is true that the ultimate question which the Board was called upon to decide was the likely impact of the Union's asserted misrepresentation upon the minds of the voters. The Board, however, had adopted a formula for determining this, namely that misrepresentation *per se* was not sufficient to avoid the results of an election unless the two other elements previously mentioned were present. The Board, by adopting the findings of the trial examiner that these two factors were not present here, concluded on this basis alone that the employees' minds had not been unduly affected. Thus the implication in the petition that even in a disputed election, where all three elements existed, the Board was free to ignore these circumstances and to rely upon its "informed and experienced judgment" is not a description of what actually took place. The text of the trial examiner's decision, accepted without comment by the Board, reveals that the Board rested its ultimate conclusion on findings that the circum-

stances in which it would ordinarily set aside elections had not occurred in this case. Thus its conclusion depended upon findings which the court below found not supported by substantial evidence.

The "informed and experienced administrative judgment" which the Board maintains it possesses was manifested in its promulgation of the rule. The rule itself is the Board's measure of the "impact" upon employees' minds. The court, far from elevating the Board's rule to the stature of a statutory requirement as petitioner has suggested, merely held itself bound by the Board's rule but not by its evidentiary findings as to the rule's application.[10] The Board in effect contends that a court of appeals is incompetent to determine whether a falsehood is material, whether it comes at the last minute, or whether the party circulating the falsehood was in an authoritative position to know the true facts. Surely once the Board has stated the ground rules for the controversy, it should have no standing to contend that its later findings on a question of whether such rules have been complied with are beyond the scope of judicial review when such

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[10] The Board's attempt to disavow its own rule comes with particularly ill grace in view of the fact that it once again adhered to the rule in its brief to the court subsequent to the remand order. It stated:

> "Where, however, special circumstances occur which impair the ability of the employees to evaluate the propaganda—that is, where both a material misrepresentation has been made so soon before the election that the other side could not reply, *and* the employees in all probability gave particular weight to the misrepresentation because its source had special knowledge of the true facts—this premise is no longer true, and the Board will require a new election. See *Merck & Co.*, 104 NLRB 891, 892; *Gummed Products Co.*, 112 NLRB 1092, 1093-1094." Memorandum of Board, p. 7.

findings are purportedly based on evidence in the record.

On remand, the court below drew the proper distinction between the area in which deference should be accorded the Board's discretion and that in which the court exercises its traditional reviewing function. The Court observed (Pet. 23-24):

> "There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946). These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board."

Adhering to the dictates of the *Universal Camera* case, it found that the evidence in the record would not support the Board's judgment.

Although the Board apparently has not the temerity to take issue with the standards of *Universal Camera* in other types of unfair labor practices, it has attempted to demonstrate a unique quality to cases such as the one at bar to demonstrate the need for different

criteria. Upon examination these distinctions are transparent and unavailing. The Board states (Pet. 13-14):

> "The review of the findings of fact describing motives and evidence presents problems different from reviewing an administrative certification of representatives. In the former case the problem is largely one of weighing conflicting testimony, or the inferences to be drawn from testimony, under the circumstances disclosed by the record. In a representation proceeding there is seldom much dispute about what happened; the agency makes a discretionary judgment based upon evidence; the question on review is whether that judgment was reasonable and was confined within the statutory limits."

Particularly in view of the *Radio Officer's* case,[11] where this Court held that "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership . . .", 347 U.S. at 45, the Board's alleged distinction between determining motivation in cases of unfair labor practices and inferring consequences in election campaigns borders on the frivolous. Non-election unfair labor practices require precisely the same drawing of inferences of probable consequences that is presented here. Courts are constantly called upon to weigh Board determinations of whether an employer's anti-union statements, reprimands to employees, or threatened plant shutdowns, are inherently coercive and illegal or within the realm of non-coercive opinion. In such cases the courts must measure the "impact" of the

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[11] *Radio Officer's Union of Commercial Telegraphers Union* v. *N.L.R.B.*, 347 U.S. 17.

employer's communications upon employees, and do so by weighing the Board's determination of foreseeable consequences in terms of the substantiality of the evidence supporting it.

The Board is in error when it states (Pet. 13) that the formula of *Universal Camera* "has not heretofore been applied to representation proceedings". In the recent case of *Cross Company* v. *N.L.R.B.*, 286 F. 2d 799, decided after this Court's *Mattison* decision was handed down, the Court of Appeals for the Sixth Circuit explicitly applied the substantial evidence requirement of *Universal Camera* to the Board's inferences of election fairness and reversed the Board's holding that campaign misrepresentations did not invalidate a representation election. Indeed, it was precisely this principle that was applied by Judge Parker in *N.L.R.B.* v. *National Plastic Products Co.*, 175 F. 2d 755, 758, cited by petitioner (Pet. 14). He stated:

> "The certification must be sustained insofar as fact questions are concerned, *if the fact findings of the Board made in connection therewith are based upon substantial evidence.*"

The Board cannot escape the consequences of its misapplication of its own rules by disavowing such rules as of non-statutory origin. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260; *Service* v. *Dulles*, 354 U.S. 363. Its ultimate conclusion with respect to the fairness and validity of an election does not arise in a factless vacuum, but must be predicated upon subsidiary findings. Inasmuch as these underlying findings were challenged by a court which applied the statutory test for review, the Board has no basis for complaint whatsoever.

3. The Holding of the Court Below Was Plainly Correct

Petitioner's attempt to defend the merits of the Board's decision (Pet., pp. 15-17) seems to imply that its reversal by the Court of Appeals was due to an assumption on the part of the judges that any misstatement made in an election campaign is enough to invalidate the results. An examination of the court's opinion (Pet. App. pp. 24-25) shows that this was not its approach. The court accepted the very criteria for appraising the effect of campaign propaganda which the Board itself had adopted (id, p. 25).

The court observed, however, that its first holding that the Union had engaged in misrepresentation was not challenged by the Board on remand. In that earlier opinion the court applied the very test for which the Board is now contending, viz., "reasonableness", with respect to that issue. The Board (and the trial examiner) had suggested that the Union letter could be read as merely a claim by the Union that "some" Celanese fringes have been won through collective bargaining. In repudiating such an interpretation the court, pointing to the absence of any limiting adjective, declared

> "In light of the immediately preceding reference to 'all of the fine fringe benefits', the challenged statement cannot reasonably be construed to refer to less than 'all' Celanese fringes."[12]

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[12] The only reason the trial examiner gave for suggesting that the employees would have attributed such a limited meaning to the Union's claim was that some of the Company's letters had mentioned benefits "of such a nature that the employees could not reasonably have believed that the Union was claiming credit for them, e.g., a disciplinary procedure handled entirely by manage-

It was on this basis, namely that the Board's construction of the written documents was not reasonable, that the court found that there was substantial evidence that a material misrepresentation had been made and an absence of such evidence to support any contrary construction of the Union letter.

The Board's contention (Pet. p. 16-17) that even granting the falsity of the statement "no reply was required to counter the effect . . . ." rests solely on its reading of the Company's letters as advancing the claim that none of the benefits recited had been the product of collective bargaining (J.A. 93). The court correctly pointed out that this was not so, and that what the company was telling the employees was that in their plant—where there was no bargaining representative—it had conferred these benefits on them voluntarily (Pet. 31-32). Obviously the Union was not contradicting this statement for its truth was obvious. What its last minute letter did do was to introduce a new issue by telling the employees that all the fringe benefits they were enjoying had been won by union bargaining at other plants.[13] Inasmuch as the Company had never made any statement as to how fringe

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ment . . . improvements in the physical facilities in the plant." (JA 89).

Obviously the Union letter would not have referred to such matters as "fringe benefits" or "Celanese fringes". What are commonly called "fringe benefits" are such items of indirect remuneration as paid vacations and holidays, pension plans, health and welfare benefits, supplementary unemployment compensation, etc. (See Chapter 209, *Fringe Benefits Under Collective Bargaining*, Bureau of Labor Statistics Bulletin No. 1225.)

[13] On this point, the court below said in its first opinion (Pet. App. 31):

> "There had been no union and no negotiations with any union concerning the particular employees involved at the Point Pleasant plant. Apparently the Union is referring to some dealings of the Company and unions at other plants."

benefits in other Celanese plants had originated, the employees were never "presented with *conflicting contentions* which they were free to evaluate" (Pet. 17). Hence the finding that it was not "likely that the employees would attribute more significance to the Union's version than to the Company's" (Pet 17) had no evidence to support it, for the employees were never furnished the Company's version. By the same token the finding that the Company needed no opportunity to rebut, since it rested on the same false premise, could not be sustained by the reviewing court.

Thus an examination of the record reveals that the Board had no reasonable basis for reaching the conclusion that it did. Its reading of the Union letter was obviously distorted, misconstrues its wording, and overlooks the obvious purpose of the Union in using the offending phraseology. The meaning the Board attributed to the Company letters shows that, unlike the reviewing court, it never carefully examined their text. Had it done so, it could never have made the finding that the Company was advising the employees that none of the benefits they enjoyed had been obtained at other locations by collective bargaining.

Conceivably the court of appeals might well have characterized the action of the Board in this case as "unreasonable, arbitrary and capricious" as well as unsupported by substantial evidence, had it not been deterred by Board counsel's inability "to think of any example of extreme arbitrariness or capriciousness, which, in his opinion, would warrant setting aside an order". (Pet. App. p. 24).

The essence of the "arbitrary and capricious" standard is that agency rules must be administered in an evenhanded fashion. Yet, subsequent to its decision in

the instant case, the Board in *United States Gypsum*, 130 NLRB No. 99, was confronted with almost identical issues and arrived at just the opposite conclusion.[14] Accordingly, it is submitted that the record in this case does not present the important federal question which Petitioner has elicited from it, for the decision

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[14] In early March, 1961, the Board in *United States Gypsum Company*, 130 NLRB No. 99, utilized the very rule involved here to set aside an election where an employer had circulated copies of telegrams containing material misstatements of fact. In that case (reprinted in its entirety as Appendix C) the employer published a telegram from its works manager at another plant, asserting that the international union permitted the local no voice in collective bargaining and had vetoed a wage increase for employees at that location. The telegram was found by the Regional Director to contain "gross misstatements, misleading statements, and deliberate misrepresentations".

The Board reiterated its familiar practice as follows:

> ". . . when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the independent knowledge to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election."

Applying this rule, which Celanese vainly invoked before the Board here, the Board found in *Gypsum* that the employees could not evaluate statements regarding conditions at a remote location, even though the petitioning union was situated there. It then observed that "in any event we find that it is immaterial which party had special or exclusive knowledge of the facts", and went on to say:

> "While a party is not necessarily entitled to an opportunity to reply to all campaign propaganda, the Petitioner was entitled to such an opportunity under the circumstances of this case . . . In this connection the Regional Director found that there was some evidence that during the campaign the Employer had mentioned its contentions that the International would conduct any contract negotiations, but that this issue did not assume a dominant role in the Employer's campaign until the receipt of the July 6 telegram."

of the court below could well be sustained on the limited standard for judicial review which Petitioner contends is proper. It is respectfully submitted that if this court is to consider adequately the drastic limitation upon the scope of review which Petitioner is urging, it should also have before it the decision of the Sixth Circuit in *Cross Company* v. *N.L.R.B.*, 286 F. 2d 799, rehearing denied 288 F. 2d 188. Yet the Board saw fit not to petition for writ of certiorari in that case although the standards for review enunciated there are precisely the same as in this one.[15]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GERARD D. REILLY
JOSEPH C. WELLS
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington 5, D. C.

EVERETT W. KRAMER
Celanese Corporation of America
522 Fifth Avenue
New York, New York

Of Counsel:

REILLY AND WELLS
1120 Tower Building
Washington 5, D. C.

[15] On July 10, 1961 the Board filed an application in *Cross* for an extension of time in which to file a petition. An extension to September 12, 1961 was granted by Mr. Justice Frankfurter. As no petition was ever filed, the case has no docket number.

APPENDIX A

SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD

v.

CELANESE CORP. OF AMERICA

No. 382. Decided February 20, 1961.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration in the light of *Labor Board* v. *Mattison Machine Works*, No. 74, October Term, 1960, decided January 23, 1961.

MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD

v.

MATTISON MACHINE WORKS.

No. 74. Decided January 23, 1961

PER CURIAM.

The judgment of the Court of Appeals is reversed and the case remanded to that court for the entry of a decree enforcing the Board's order. The refusal of the Court of Appeals to enforce that order because the Board's notices of election contained a minor and unconfusing mistake in the employer's corporate name, was plain error. It was well within the Board's province to find, as it did, upon the record before it that this occurrence had not affected the

fairness of the representation election, particularly in the absence of any contrary showing by the employer upon whom the burden of proof rested in this respect. That finding should have been accepted by the Court of Appeals. In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order.

Judgment reversed and cause remanded.

APPENDIX C

130 NLRB No. 99 D-1928
Greenville, Miss.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 26-RC-1407

UNITED STATES GYPSUM COMPANY, *Employer*

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

Supplemental Decision, Order and Direction of Second Election

Pursuant to a Decision and Direction of Election[1] issued by the Board on June 15, 1960, an election by secret ballot was conducted on July 8, 1960, under the direction and supervision of the Regional Director for the Twenty-Sixth Region among the employees in the appropriate unit.[2] Fol-

[1] Not reported in printed volumes of Board Decisions.

[2] The unit as stipulated by the parties and found appropriate by the Board is: All production and maintenance employees at the Employer's insulation board, hardboard, hardboard products and insulation tile manufacturing plant at Greenville, Mississippi, including press operators and quality leaders in Press Board department, chipper operator leaders, commodity inspectors and fabricating leaders in Finishing department, maintenance leaders, and truck-

lowing the election the Regional Director served upon the parties a Tally of Ballots which showed that of approximately 279 eligible voters, 269 cast ballots, of which 127 were for, and 139 were against, the Petitioner, 2 ballots were challenged, and 1 ballot was void. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the Board's Rules and Regulations, Series 8, the Regional Director conducted an investigation of the objections and, on September 1, 1960, issued and duly served upon the parties his Report on Objections, in which he found that Objections 1 and 3 had merit and recommended that the election be set aside and a new election held. As to the remaining objections, he found them to be without merit and recommended that they be overruled. The Employer filed timely exceptions to the Regional Director's findings and recommendation, together with a brief in support of such exceptions.

Upon the entire record in the case, the Board finds:[3]

In its Objections 1 and 3, the Petitioner contends that the Employer exceeded the bounds of legitimate campaign propaganda by making certain false and misleading statements to employees which interfered with the freedom of choice in the election. The instant election was held between 6:00 A. M. and 8:00 A. M. and from 2:00 P. M. to 4:00

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drivers, but excluding watchmen, testers, laboratory technicians, quality leaders in Quality department and other technical and professional employees, office clerical employees, storeroom clerks, Forestry department employees, commodity auditors and production schedulers, head boiler operator and relief foreman in Yard and Board Mill department, relief foreman in Press Board department, relief foreman in Finishing department, acoustical operating leaders, hardboard trimmer operators, big trimmer operators, head saw filer and tile machine operators in Finishing department, mechanical loading leaders and relief mechanical loading leader in Warehouse and Shipping department, shift foreman and all other supervisors as defined in the Act.

[3] In the absence of exceptions thereto, we adopt *pro forma* the Regional Director's findings and recommendations that Objections 2, 4, 5, 6, and 7 be overruled and hereby overrule them.

P. M. on July 8, 1960. The investigation revealed that on July 6, 1960, the Employer received two telegrams from the Works Manager of its New Brighton, New York, plant concerning the Company's bargaining relationship at that plant with the District Lodge of this Petitioner which is the certified union at that plant. The first telegram read as follows:

> MEN AT THIS USG PLANT NOW ADMIT THAT BRINGING IN MACHINISTS WAS A COSTLY MISTAKE, NO LOCAL UNION IS RECOGNIZED AND NO EMPLOYEE IS AUTHORIZED TO BARGAIN OR SIGN A CONTRACT. THE INTERNATIONAL BOSS HAS ALL AUTHORITY AND CONTROL. HE MAKES ALL DECISIONS WITHOUT CONSULTING EMPLOYEES. MEN WOULD LIKE WAGE INCREASE BUT UNION SAYS NO. MACHINISTS HAVE PREVENTED WAGE INCREASE HERE FOR 19 MONTHS.

The second telegram stated:

> UNION REPRESENTATIVES DID NOT SHOW UP FOR SCHEDULED MEETING TODAY. I DO NOT KNOW THE REASON AND WILL WAIT UNTIL SOLAR CONTACTS ME REGARDING ANOTHER MEETING.

Copies of the above telegrams were distributed to each of the Employer's supervisors on July 6, and the information contained therein was used in conversations with employees urging them to vote against the Petitioner. The Greenville Works Manager read the contents of the telegrams and commented thereon to at least one group of approximately 45 employees on the afternoon of July 6, 1960. The telegrams were also shown to various employees, and copies were posted on the plant's bulletin boards on July 7, the day before the election.[4] The Petitioner's representative stated that the use of the above telegrams was not brought to his attention until the night before the election.

The Regional Director found that the first telegram, except for the first sentence ("men at this USG plant now

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[4] The Employer has not disputed the accuracy of the above facts found by the Regional Director and summarized herein.

admit that bringing in machinists was a costly mistake"),[5] contained gross misstatements, misleading statements, and deliberate misrepresentations, all calculated to convey to the Greenville employees the impression that the employees at the New Brighton plant had no voice whatsoever in the negotiations and that the Union had willfully prevented the Employer from granting raises at the latter plant. He further found that the information was within the special knowledge of the Employer because of its participation in the New Brighton negotiations and was of a nature that the employees themselves could not evaluate. He also found that the statements were made by a party whom the employees could reasonably consider to be in an authoritative position to know the true facts. With respect to the second telegram, the Regional Director found that its use, considered in context with the contents of the first telegram and the simultaneous posting and circulation, was to bolster and to emphasize the misrepresentations of the first telegram. Accordingly, the Regional Director concluded that the Employer's use of the two telegrams constituted improper election propaganda which prevented the exercise of a free choice by the employees in the election of their bargaining representative, and he recommended that these objections be sustained, the election set aside, and a new election directed.

The general rules which the Board applies to election campaigns are well settled and not in dispute. Exaggerations, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, may be excused as legitimate campaign propaganda provided they are not so misleading as to prevent the exercise of a free choice by employees in the election of their bargaining representative.[6] Absent threats or other elements of intimidation, the Board will

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[5] As no exceptions were filed to this finding as to the first sentence, we adopt the finding *pro forma*.

[6] *The Gummed Products Co.*, 112 NLRB 1092.

not undertake to police or censor the propaganda material used by the participants in a Board election, and leaves it to the opposing party to correct, and ~~to the~~ employees themselves to evaluate, such utterances. However, when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the independent knowledge to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election.[7]

The Employer contends, in essence, that the Regional Director improperly applied these rules to the facts before him. Specifically, it argues that the use of the telegrams was legitimate campaign propaganda because (1) the signer of the telegram believed some of the statements to be true and they were merely expressions of opinion, (2) the facts were more within the special knowledge of the Petitioner than of the Employer, (3) the statements related to issues raised and discussed during the campaign and must be considered in the context of the campaign, (4) the Petitioner had ample opportunity to answer the statements and did so, (5) the Greenville employees had experienced organizational drives, electioneering, and bargaining, and hence were fully competent to evaluate the truth or falsity of the statements, and (6) the second telegram must be considered separately rather than in conjunction with the first. We find each of these contentions to be without merit.

In support of the truth of the first telegram, the New Brighton Works Manager supplied an affidavit in which he asserted that the representative of District Lodge No. 15, the certified union, had stated that he alone was authorized to negotiate and sign a contract and he made all decisions

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[7] *The Cleveland Trencher Company*, 130 NLRB No. 59; *Kaynecr Company*, 119 NLRB 1460; *The Calidyne Company*, 117 NLRB 1026, 1028.

without consulting the employees. The Employer contends that the telegram therefore stated the facts as the Works Manager believed them to be. But certain of the statements so distort the actual facts as to be misleading because the employees could not properly evaluate them unless the Petitioner had an opportunity to point out the misstatements. Thus, the statement that "['the International boss'] makes all decisions without consulting employees" is contradicted by the aforesaid affidavit of the New Brighton Works Manager which admits that employees sat in the bargaining sessions but "had little or nothing to say."[8] The fact of even limited employee participation was not mentioned in any of the campaign literature quoted by the Employer in its brief and was presumably unknown to the Greenville employees. Knowledge of this fact was essential in order for them to make a proper evaluation of the statement. However, even assuming the telegram stated the facts as they were honestly believed to be, the statements are not couched in terms of an expression of opinion and, contrary to the Employer's view, are clearly not recognizable as such on their face. In this context, the effect on the employees of an unintentional misrepresentation would be no different from that of a deliberate misstatement.[9] We also agree with the Regional Director that the last two sentences were deliberate misrepresentations. Indeed, the Employer has not attempted to argue that they were true, but merely that they were recognizable by the employees as campaign propaganda. For the reasons set forth below, we do not believe that the employees could recognize them as such.

We disagree that the facts were more within the special knowledge of the Petitioner than of the Employer and that the Petitioner had ample opportunity to answer. The as-

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[8] Also, members of the negotiating committee at the New Brighton plant submitted a signed statement to the effect that they have participated in the negotiations.

[9] *Kawneer Company, supra*, footnote 7.

sertions are as to factual events at a location far removed from the Greenville plant. To apply a theory of constructive knowledge or infer actual knowledge by Petitioner's representatives in Greenville under these circumstances would be unrealistic. In any event, we find that it is immaterial which party had special or exclusive knowledge of the facts. The Board will set aside elections because of material misrepresentations of fact "where (1) the employees would tend to give particular weight to the misrepresentation because it came from a party that . . . was in an authoritative position to know the true facts, and (2) no other party had sufficient opportunity to correct the misrepresentation before the election."[10] The Board has also set aside an election because the distribution of misstatements concerning a matter which the employees could not evaluate independently on the 2 days preceding the election gave the Employer insufficient time to learn of and point out the misstatements.[11] Because of the position of the New Brighton Works Manager and his participation in the negotiations at that plant, we find that he was a party in an authoritative position to know the true facts and that the employees would tend to give particular weight to his misrepresentations. And the distribution, discussion, and posting of the telegrams on the 2 days before the election gave the Petitioner insufficient time to learn of and point out the misstatements.[12] While a party is not necessarily entitled to an opportunity to reply to all campaign propaganda, the Petitioner was entitled to such an opportunity under the circumsances of this case. The Employer's prime contention is that the first telegram should be considered in the context of the election campaign and

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10 *Celanese Corporation of America*, 121 NLRB 303, 307.

11 *Kaumeer Company, supra.*

12 *The Lundy Baking Company*, 124 NLRB 905, is clearly distinguishable, in that there the last minute misstatements had also been made 2 months before the election, which permitted the employees ample time to make inquiries if they wished. Here, on the contrary, no such adequate time was available.

the attendant propaganda. We agree. However, we do not agree that when so considered the statements of the first telegram were merely repetitious and understandable or that the Petitioner's previous denials of the Employer's prognostications were sufficient answer and permitted full and proper evaluation by the employees. In this connection the Regional Director found that there was some evidence that during the campaign the Employer had mentioned its contentions that the International would conduct any contract negotiations, but that this issue did not assume a dominant role in the Employer's campaign until the receipt of the July 6 telegram. However, even if the Employer is correct and employee participation was a dominant issue, we find a vast difference between the predictions made prior to July 6 and the statements of fact contained in the July 6 telegram. In fact, such assertions of fact following on the heels of the Employer's forecast would, in our opinion, be given even greater weight by the employees.[13] Under these circumstances, the previous contrary predictions by the Petitioner cannot be said to take the place of an opportunity to deny the asserted facts. Nor do we believe that such prior campaign predictions by the parties enabled the employees properly to evaluate the facts reported in the first July 6 telegram.

The Employer's assertions as to the experience of the Greenville employees in organizational drives, electioneering, and bargaining are completely unsupported by any factual allegations and hence must be rejected. We note,

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[13] Cf. *The Gummed Products Company*, 112 NLRB 1092, 1094. The cases relied on by the Employer in support of its position that in context of the campaign the telegram was permissible propaganda are clearly distinguishable. In *Universal Producing Company*, 123 NLRB 548, the employer's statements were found to be an expression of legal position as to future bargaining. In *Celanese Corporation of America*, *supra*, the union's last-minute campaign release was merely a repetition of its prior claims, which had been answered by the company, but asserted additional matters of the same nature. In *Borders, Incorporated*, 114 NLRB 751, there had been an actual denial by the employer and the union's misstatements were not repeated thereafter.

however, that the Board's records reveal no prior petitions involving the employees at the Greenville plant during the past 6 or 7 years. The experience of employees at other plants of this Employer cannot be attributed to the employees at the Greenville plant.

The Employer's final contention, that the second telegram must be considered separately, is also rejected. This telegram, like the first, should be considered in the context of the events. When so viewed, it is clear that the Regional Director's findings with respect to its improper use were correct, and we therefore adopt them.

In view of the foregoing, we find that the Employer's use of its telegrams exceeded the bounds of legitimate campaign propaganda and lowered the standards of campaigning to a level which impaired the free and untrammeled expression of choice by the employees. Accordingly, we shall order that the election of July 8, 1960, be set aside, and shall direct that a new election be held.

Order

It Is Hereby Ordered that the election conducted herein on July 8, 1960, be, and it hereby is, set aside.

Direction of Second Election

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to

vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[14] Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes, by International Association of Machinists, AFL-CIO.

Dated, Washington, D. C., Feb. 28, 1961.

JOSEPH ALTON JENKINS, *Member*
JOHN H. FANNING, *Member*
ARTHUR A. KIMBALL, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LEEDOM and MEMBER RODGERS, dissenting:

We believe that the majority has misapplied existing precedents to the facts in this case. The main thrust of the first telegram in question[15] is the charge that during negotiations for a contract at another plant of the Employer, the "International Boss," the Petitioner herein, had usurped the bargaining authority to the detriment of the employees. Such a charge, involving a matter about which both the Employer and the Petitioner had equal knowledge, constitutes an expression of opinion or ultimate conclusion by the Employer, as to its version of the negotiations between the Petitioner, together with its Local, and Employer. That this version may have differed from

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[14] Employees engaged in an economic strike which began less than 12 months from the date of the election who have been permanently replaced and their replacements shall vote by challenged ballot.

[15] The second telegram also relied upon by the majority is, in our opinion, obviously innocuous.

that of the Petitioner, or that a different conclusion might have been reached, affords no basis for setting aside election, or surely on the basis of form and content the employees could readily evaluate the telegram as mere self-serving propaganda which could reasonably be expected in a hotly contested election.[16]

Moreover, we note that the discussion of the telegram with the employees commenced two days before the election and it was posted on the bulletin board the day before. Its content was therefore a matter of common knowledge throughout the plant. It is inconceivable that the Petitioner, which had 127 adherents in the plant, was not informed of the telegram until the night before the election. But even so, there was still opportunity to counter the Employer's telegram, as the Petitioner, a party to the negotiations, had all relevant information on hand. Its failure to act convinces us that it then regarded the telegram as not being a material factor in the election and that it changed its mind only after the adverse election results were made known.

For these reasons we would overrule the objections and certify the results of the election.

Dated, Washington, D. C.

BOYD LEEDOM, *Chairman*
PHILIP RAY RODGERS, *Member*

NATIONAL LABOR RELATIONS BOARD

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[16] In our opinion, the case of *Cleveland Trencher Co.*, 130 NLRB No. 59, relied upon by the majority to support its decision, is factually distinguishable. That case involved misrepresentations as to matters within the special knowledge solely of the party making them, and the Board (*Members Jenkins and Fanning* not participating) concluded that the employees were unable to evaluate such misrepresentations. Here, the matters allegedly misrepresented were within the special knowledge of both parties to the proceeding.